

INTRODUCTION: “MY KEYWORDS FOR UNDERSTANDING JAPANESE LAW”

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The articles and essays contained in this volume have their origins in a conference held on May 25, 2013 at Doshisha Law School in Kyoto and co-sponsored by the Michigan State University College of Law (MSU). The impetus for the event was the confluence of fortuitous circumstances: the fourth year of MSU’s highly successful summer law program held in Kyoto at Doshisha and the fact that two of the American speakers happened to already be in Tokyo on sabbatical at the same time. It was thus possible to have an “international” conference with “speakers from abroad” and a multinational audience without paying any international airfare! It also seemed like a good opportunity for many of us to honor Kōichirō Fujikura, a wonderful man and former colleague, who has been a great mentor to many foreign scholars of Japanese law, including the majority of the participants.

The theme of the conference was as set forth in the title to this essay: “My Keywords for Understanding Japanese Law.” It was intended to serve three agendas. The first was quite prosaic: attracting an audience. Law is usually not a subject that fills seats anywhere and an even tougher sell when discussed in a foreign language (*i.e.*, English). As anyone who has spent time here is aware, many Japanese people are very interested in how foreigners view their country. It was thus a theme that seemed likely to be of interest to at least a few Japanese people.

The second agenda was to enable those speakers who wished to talk and write about whatever aspect of Japanese law they happened to be interested in at the time. Several papers reflect this approach and have contributed to giving this volume a welcome broad coverage of topics.

The third agenda was the most complex: to provide an opportunity for introspection. For those of us who “do” Japanese law for a living, I think it is not unusual to detect a common theme in the work of our colleagues, a leitmotif that recurs even across articles that deal with very different subjects. For

example, J. Mark Ramseyer, one of the most influential scholars in the field of Japanese law, is known for his “law and economics” approach that generates sometimes surprising conclusions from empirical data and statistical analysis. For his part, John O Haley, another preeminent scholar, has in a number of places expressed the view that the high quality of Japanese judges (and prosecutors) is both a reason to study Japanese law and a contributing factor in the nation’s success.¹

We can even reduce these recurring themes into simplistic formulas, keywords that identify the scholar with a particular approach to Japanese law. Perhaps Ramseyer’s formula might be “Ramseyer = Law and Economics,” and Haley’s formula might be “Haley = Japanese judges are great.”

There may even be a ready temptation to engage in this exercise for the purpose of disagreeing with that approach. For example, based on my own discussions with numerous criminal defense lawyers, “Japanese judges are great” is a sentiment at least some of them do not appear to share. Similarly, while numbers may be the universal language, economic numbers have a social context that might be capable of leading the law and economics approach astray. For this reason one might question, for example, the effort by Ramseyer and his colleagues to identify where the “brightest” Japanese lawyers are based on their appearance on the lists of high-paying tax payers published by the Japanese government until 2006.²

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¹ See e.g. John O. Haley, *Why Study Japanese Law?*, 58 AM. J. COMP. L. 1 (2010) (“Its public officials, particularly career judges and prosecutors, have the world’s best record for integrity and enjoy the highest levels of public trust.”); John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, WASH. UNIV. SCHOOL OF L., (last updated Oct. 25, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=821466.

2. Minoru Nakazato, J. Mark Ramseyer, et al., *The Industrial Organization of the Japanese Bar: Levels and Determinants of Attorney Income*, JOHN M. OLIN CTR. FOR LAW, ECON. AND BUS., (Oct. 2005), <http://www.law.harvard.edu/faculty/ramseyer/industrialorganization.pdf>.

Among other things, the approach seems to ignore the fact that a significant proportion of the Japanese bar was comprised of socialists, communists and Marxists for whom becoming a lawyer was a deliberate anti-establishment

Of course, it would be a grave mistake and a terrible disservice to reduce to a few simplistic keywords the works of scholars such as Ramseyer or Haley. That was sort of the point. The third agenda behind the conference theme was thus *not* to reduce the field of Japanese law to a simple magic formula, but to reflect on how our own individual approaches to the subject might themselves be reflected to an oversimplified set of keywords. In fact my original inspiration for the theme was a Matt Groening cartoon about the Nine Types of College Teachers, one of whom is the “Single Theory to Explain Everything Maniac.” He is pictured explaining: “The nation that controls magnesium controls the universe!!!”³

For example, I tend to look at any given Japanese law or institution by first trying to ascertain what the relevant government actors “get” out of it; after all, they are usually the ones who drafted the law or operate the institution. Does that mean that non-governmental actors get nothing out of the legal system? Of course not: that is just not discussed in my article on *amakudari* because I have chosen to focus on how Japanese officialdom (including judges) may benefit personally from the way the legal system is designed and operated. Reduced to a simple theme such as *amakudari*, my perceived view of Japanese officialdom would likely appear to conflict with Haley’s. Yet the reality is more complex.

lifestyle choice that valued ideology and social justice over money. This is reflected in the argument made by some sectors of the Japanese bar that allowing too many law school graduates to qualify as lawyers will result in *less* public interest litigation. While seemingly ridiculous, this argument actually has a certain logic, since traditionally such litigation has been handled by lawyers who have been able to enjoy a modest lifestyle because of the ready availability of sufficient “bread and butter” paying client files generated by the artificial scarcity of lawyers. Accordingly, if more lawyers have to compete aggressively for enough work just to pay the rent, fewer will be able to devote their energy to *pro bono* work. Whether this argument is sound or not, it is hard to see how taxpaying records can identify “good” lawyers among the many who were not motivated by money to join the profession in the first place. *Id.*

3. MATT GROENING, SCHOOL IS HELL: A CARTOON BOOK (2004). “Warning: theory may be correct.” *Id.*

Furthermore, I do most of my writing and research in Kyoto where I am virtually free of concerns for the safety of myself and my family, at least when it comes to crime. That I am able to take my day to day physical safety for granted doubtless gives me a different perspective on the subject of law and order than John Haley who until recently was based in St. Louis, one of the most dangerous cities in the country.⁴ Similarly, the fact that I went to law school to avoid horrible, horrible math may give me a tendency to want to discount at least some of Ramseyer's work, but that is a matter of my own failings rather than his.

Thus, I completely agree with the assertions in Bruce Aronson's insightful piece, both that "it is a horrible idea to provide a keyword for understanding Japanese law" and that "[r]esearchers on Japanese law and society can utilize their expertise and experience to contribute to the understanding of Japan by providing context." However, this third aspect of the keyword theme was intended in part to address the fact that the viewpoint of the researcher is also a contextual element that may bear explanation. I think this is illustrated with great wit and erudition by Giorgio Colombo in his witty portrayal of the stereotype-laden perspectives that some of the European comparativists have used in trying to ensure their compendia are "comprehensive" in containing entries on Japan and other "exotic" legal systems.

In a similar vein, Stephen Givens' provocative essay on vagueness in Japanese law illustrates that part of the context we provide includes our own assumptions about our intended audience. This may include not only how we think they are likely to understand (or be misunderstanding) the subject matter, but also how what we say will affect them.

The creation of this type of context is part of what we bring to the table as comparativists; not only must we understand the subject we are talking about, we must also understand our audience enough so that we can explain it in a way that

4. *Most Dangerous U.S. Cities*, CNN, (last visited Feb. 4, 2014), http://money.cnn.com/gallery/real_estate/2013/01/23/dangerous-cities/index.html.

maximizes their comprehension. Done properly this can be a very useful exercise, done less skillfully it risks becoming a different type of keyword-like oversimplification, the creation of conceptual straw men whose assumed misunderstanding of the subject matter we can remedy all too easily.

Of course, sometimes it is hard to know where to set our sights. As among ourselves we are probably in agreement that Japan is a “normal” country when it comes to law, and that mystical cultural explanations and stereotypes are likely to be both misguided and annoying. Yet those of us who teach or practice in Japan must still deal with the students who spout Kawashima, the taxi driver who explains why Japanese people don’t go to court, or the foreign businessman who wants to “do things the Japanese way” – whatever that means!

“Keywords” thus represent the struggle we face in packaging our content in a way that means something to others. Just as our own lives usually seem more complicated than anyone else’s, our own perspectives on a subject we have been studying, whether it is Japanese law or anything else, is bound to be the most nuanced. To convey our knowledge to others we must not only reduce it to a manageable size, but also provide a context that is itself the product of simplification and assumptions. No matter how hard we try to present a “complete” picture, the magnitude of the task together with our blindness to our own contextual limitations render it an impossible task. But perhaps if enough of us gather together, like blind men assembling an elephant, a clearer, more complete picture may at least emerge for our audiences. Isn’t that why we have symposia in the first place?

In closing I would note that Stephen Givens is also right to remind us that most of the conference speakers brought a western, Judeo-Christian context to the subject of Japanese law. In fact, the works in this collection reflect a predominantly American and exclusively male perspective. In my defense as the organizer I would again note that part of the exercise was to present the Japanese audience with the prospect of experiencing various foreign views of Japanese law. Furthermore, efforts were made to be more demographically inclusive at both the invitation

and publication stage. Unfortunately, the schedules, commitments and other circumstances meant some invitees could not come and some of those who did were subsequently unable to contribute a paper.

Finally, I would like to thank the editors of this fine journal for devoting an entire issue to our symposium. Thanks are also due to Professor Frank Ravitch of MSU for helping to make the summer program, the symposium, and this issue of the journal possible. Finally thank you to all the speakers in the conference, including those whose works are reflected in the pages that follow.